No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. .....

VERA GIOVANNETTI, *Petitioner*,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Vera Giovannetti, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeals of the petitioner when she had good causes of action accepted by the court which had jurisdiction over all of the persons involved and the subject matter, yet was deprived of her Constitutional safeguards because of the improper application and interpretation of the Federal Rules of Civil Procedure.

The final judgment of the U. S. Court of Appeals for the District of Columbia Circuit was rendered on March 23, 1959 in case No. 14,844 which in turn related to case 14,299. (R/4 14844)

OPINIONS BELOW

No opinions were rendered . . . only a series of orders listed in the Appendix on which the Petition is based.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1959. (R. [illegible])

The jurisdiction of the Supreme Court of the United States is invoked under Article 3, Section 2 of the Constitution of the United States, Article VII of the Amendments to the Constitution and Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

Whether a District Court on remand with instructions to clarify an order by memorandum or order with a further notation that if the clarification is made by amending the orders certain rights would be reserved to the aggrieved party as to the taking of an appeal therefrom—may abuse this privilege by not clarifying or amending—but changing the order from permission to enter a non-suit without prejudice to one of dismissal with prejudice for want of prosecution.

Whether a District Court's memorandum supporting a changed order (out of term) may include points and authorities for application to the contention that the order was made under Rule 41(b) of the Federal Rules of Civil Procedure when in fact that particular section of the rule did not apply and cites cases that are completely inapplicable to the stated facts in the instant case.

Whether a United States Court of Appeals in remanding a cause for clarification and noting therein that if the clarification is made by a memorandum said Court will reinstate the appeal if a motion is filed by appellant within ten days after the filing of such memorandum—may, after the motion by appellant is timely filed, deny the motion without cause or explanation, and thus dismiss the cause.

Whether a United States Court of Appeals committed grievous error when on motion of appellees requesting reconsideration of an order on the grounds that appellant failed to comply with Rules 15 and 16(b) of the Court dismissed the appeal when, in fact, there was substantial compliance, and further permitted the District Court to compound the error by affirming its action in dismissing the cause with prejudice for want of prosecution when the record indicates just the opposite and that he did not abuse his discretion in doing so, although the action was contrary to the weight of opinions rendered in decisions concerning Rules 59 and 60 of the Federal Rules of Civil Procedure.

RULES INVOLVED

Rule 41(a)(1) of the Federal Rules of Civil Procedure provides:

> (a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
>
> (1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
>
> (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this

rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 56(d) of the Federal Rules of Civil Procedure provides:

> (d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 59(a) and (b) of the Federal Rules of Civil Procedure provides:

> (a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> (b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made

after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

Rule 60(b) of the Federal Rules of Civil Procedure provides:

> (b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding, * * *

Rule 15 of the United States Court of Appeals for the District of Columbia Circuit:

> STATEMENT OF POINTS. Within 10 days after the filing and docketing of the record in this court, appellant shall serve on appellee or his attorney and file with the clerk a concise statement of the points on which he intends to rely on the appeal, unless he has filed a statement of points in the District Court under the provisions of subdivision (b) of Rule 12 of this Court.

Rule 16(b) of the United States Court of Appeals for the District of Columbia Circuit:

> (b) STATEMENTS OF APPELLANT AND APPELLEE AS TO CONTENTS OF JOINT APPENDIX. Within 10 days after the filing of the record appellant shall serve and file with the clerk a statement of the parts of the record he proposes to print in the joint appendix. Within 10 days after the filing of appellant's statement, appellee shall serve and file a statement of the parts of the record not included in appellant's statement which appellee desires to have printed in the joint appendix.

Article VII of the Amendments to the Constitution of the United States which reads in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *"

STATEMENT

Petitioner filed a timely suit in the United States District Court for the District of Columbia against the respondents for wrongful death, malpractice and negligence in 1953 and from that time on, numerous motions and oppositions thereto were filed by both parties but three writings (memorandums and orders) dated February 1, 1957, February 27, 1957 and April 16, 1957 created the crisis leading up to plaintiff's oral motion of October 7, 1957 for a voluntary non-suit without prejudice and the granting of same, followed by the controversy we are now faced with in determining where and how the appeal(s) were mishandled by the Court of Appeals for the District of Columbia Circuit and subsequent incorrect actions committed by the District Court.

On February 1, 1957 the motions judge issued a memorandum reading in part: (~~Appendix~~ R. 11-12)

"There have been in this case actually what might be called three complaints filed. All three have been objected to as offending against Rule 8(e) F. R. Civ. P. in that they were vague, indefinite and prolix. Having in mind, however, (f) of the same rule, that all pleadings shall be construed as to do substantial justice, this Court concluded, when an attack was made by motion on the so-called second amended complaint, that despite a certain amount of circumlocution and vagueness, a cause of action had been stated" (para. 4, Second Amended Complaint), * * * pre-trial was had on October 11, 1956 at which time the pre-trial Judge directed * * * "counsel for plaintiff to draw a *consolidated* (italics supplied) plaintiff's pre-trial statement

which will state a cause of action * * * * * * despite the fact that this Court had already ruled that the plaintiff had stated a cause of action, inartistically drawn, to say the least, as it may have been. * * * This so called consolidated pre-trial statement was filed on November 2, 1956. * * * This was objected to by motions of summary judgments et al., and the Court addressing itself to the motion, concludes: The Motion as to summary judgment is denied without prejudice, but that with reference to alleged skill on the part of defendant surgeon is granted. (T. p. 31.) That part of the motion couched in the alternative asking for the striking of certain claims made by the plaintiff in the so-called pre-trial statement is granted. Such material if anything is mostly evidentiary. They are specifically; all matters relating to consent; the so-called use of the plaintiff's decedent for experimental and educative purposes; and the allegation that the decedent's condition was brought about by use of drugs.

"* * * To again repeat, what plaintiff actually is claiming here as a cause of action * * * is that there was caused to be brought about as a result of negligence upon the part of the defendants, individually and all three, needless intervention upon the body of the decedent, as a consequence of which he died because of the fact, as alleged, that he was a poor operative risk and the operation * * * should not have been performed at all. This being the claim, the defendants are entitled to have indicated specifically what evidence she intends to bring forward and adduce in its support against each or any of them, or all of them acting in concert, so that discovery procedures may be had as the rules provide. * * * The court's order therefore, is that the plaintiff furnish the defendants with the names of the medical witnesses, with their addresses and the subject matter to which their testimony will be addressed. * * *"

To this memorandum or order, the plaintiff filed a motion for reconsideration of defendants' motions for summary

judgment and other relief and for reconsideration of the court's memorandum stating: (R. 71, 72, 73)

1. That by the Memorandum Opinion filed herein, the Court has stricken vital issues from this cause, and has denied unto plaintiff a right to trial upon all issues, causes of action and merits of her case as set forth in her complaint.

2. That plaintiff is entitled to a jury trial herein upon all questions, and issues of negligence and malpractice set forth and claimed by her, in addition to the single issue and element left in the case, and permitted unto plaintiff to proceed herein and herewith, by the Court's Memorandum Opinion, namely, the single issue of whether or not the decedent was a "good operative risk," at the time defendants herein proceeded to operate on said decedent in this cause.

3. That the Court has stricken from plaintiff's Complaint all of the vitality contained in the same, and by the Memorandum Opinion, has denied unto plaintiff her day in Court upon all issues raised in and by her Complaint with respect to malpractice, negligence and all other issues apparent in her Complaint, and to which she is entitled to a jury trial herein.

4. And for other reasons, apparent on the record of this case, the Court should grant unto plaintiff all of the relief sought by this, her Motion for Reconsideration filed herein, and for other reasons to be presented at the hearing of this matter.

On February 27, 1957, the District Court sitting as a motions court (R. 75, 76, 77)

ORDERED that the defendants' motions for summary judgment so far as they seek a complete and final judgment on the merits against the plaintiff be and the same are hereby denied; that all claims against the defendant John P. Gallagher, M.D., challenging his skill, competence and technique in the performance of a burr-hole operation on plaintiff's decedent on November 13, 1952, be and the same are hereby stricken and dismissed; that the sole claim against the defendant John P. Gallagher, M.D., upon which the plaintiff may proceed to trial, except as hereinafter provided, is the

plaintiff's challenge to the medical wisdom and judgment of defendant John P. Gallagher, M.D., in deciding to operate at all upon plaintiff's decedent, and

IT IS FURTHER ORDERED that all claims of the plaintiff seeking damages for loss of consortium, grief or sorrow be and the same are hereby stricken and dismissed; that plaintiff's allegations against defendants Frank A. Finnerty, Jr., M.D., and Georgetown University Hospital and its agents, servants or employees, pertaining to the question of consent as to operative procedures, pertaining to the use of drugs in treating plaintiff's decedent and pertaining to the alleged use of plaintiff's decedent for experimental and educative purposes be and the same are hereby stricken and dismissed, and

IT IS FURTHER ORDERED that the plaintiff may proceed the trial, except as hereinafter provided, against defendants Frank A. Finnerty, Jr., M.D., and Georgetown University Hospital solely on the question as to whether or not plaintiff's decedent should, as a matter of good medical practice, have been subjected to the operative procedures performed upon him, but

IT IS FURTHER ORDERED that, since on February 1, 1957 this Court, by memorandum filed in this cause, directed the plaintiff to furnish within ten (10) days (10) the names of medical witnesses and their addresses who would testify that the performance of a burr hole procedure upon plaintiff's decedent was medical malpractice and a proximate cause of the death of plaintiff's decedent under penalty of dismissal, * * * the plaintiff's action will be, in its entirety, dismissed with prejudice, unless the direction of Court, set forth in the memorandum of Feb. 1, 1957 is complied with, within 30 days from that date hereof.

On April 8, 1957 petitioner filed a motion to amend the pre-trial statement to include all subjects of issue contained in the medical testimony furnished to defendants' counsel in compliance with the court's order of February 1, 1957, and on the same day filed a memorandum showing what nine medical witnesses would testify to. (R. 94-99)

On April 16, 1957 in a memorandum for the trial Judge, the motions judge made it a specific point to limit the issue to be tried at the trial to one item, namely, whether or not a burr hole operation was called for and noted that all others have been stricken and dismissed, calling the trial Judge's attention to the memorandum of February 1, 1957. Further the memorandum indicated that only **two** of the doctors should be allowed to testify, indicating that the testimony of the seven other medical witnesses was not to be heard.

The memorandum concluded that "Since she has now furnished the names of the individual witnesses as indicated and has gone another step forward in indicating the nature of their testimony, I can see no reason why this case should not be set for trial and it is not to be postponed under any circumstances because of lack of counsel, the plaintiff indicating in her motion that she is either more than ordinarily familiar with Court proceedings or has had the advantage of professional advise. * * *" (R. 57-58)

On October 7, 1957 petitioner appeared in Court on the day the cause was set for trial and in open court prayed for a non-suit without prejudice on the one issue left before the Court since summary judgments had been granted to the defendants on the real issues of the case which were originally set forth in the accepted complaint and determined in the pre-trial order of October 11, 1956. (R. 59-61)

The Court hearing counsel for the defendants stated "If it is dismissed for want of prosecution, it is dismissed without prejudice" * * * and then continuing, said:

"The only motion he makes before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement."

Directing his attention to petitioner's counsel the Court advised him thusly:

"If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial. * * * I think you had better withdraw your whole statement, that is my suggestion."

Thereupon petitioner's counsel stated:

"It is withdrawn and at the same time, the motion is made cleanly for a non-suit without prejudice."

The Court replied: **"I will grant that motion."**

An attempt by counsel for respondents to have placed on the record a statement that petitioner was not ready to go to trial was answered thusly by petitioner's counsel:

"Oh, no. We are limited to the issue because the summary judgment granted to the defendant was the meat of our action."

Finally, being pressed by respondents' counsel, the Court questioned petitioner's counsel: "Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?"

Petitioner's counsel answered, "That is correct."

The Court then remarked, "And you are moving to dismiss for want of prosecution. That is what the effect of it is."

Counsel for petitioner replied, "I don't like the words 'for want of prosecution.'"

The Court concluded the hearing thusly: "Motion of Plaintiff to dismiss cause of action on the ground of inability to prove cause of action on issue limited by the Court is granted."

It would therefore seem to be plain that there was an oral motion granted to petitioner for a non-suit without

prejudice but listed by the court as a dismissal of the cause of action on the ground of inability to prove cause of action on issues limited by the Court, but at no time was there an agreement or a positive decision by the Court that this was a dismissal with prejudice on the ground of want of prosecution.

On October 8, 1957 respondents' counsel drew up an order pertaining to the hearing of the previous day and because of the wording therein, petitioner's counsel refused to accept or agree to same but nevertheless it was signed by the trial judge, over the objection of petitioner's counsel. (R. 14-29).

A motion to reinstate the claim under Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure was denied on November 14, 1957. Thereupon a timely appeal was filed as to the two orders—the one of October 8 and the one of November 14, 1957. (R. 14-29)

The brief for appellant was filed and the bond posted, but nowhere in the record is there a record of the respondents Georgetown University Hospital and Finnerty ever filing a brief in reply. Nevertheless, on October 1, 1958 the Court of Appeals heard arguments on the case and on October 6, 1958 issued a remand to the District Court, reading thusly:

> This cause came on for consideration on the transcript of the record from the District Court, and was argued by counsel.
>
> After consideration whereof, it is ORDERED by the court that this cause be, and it is hereby, remanded to the District Court for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, so that expression is used in the Federal Rules of Civil Procedure.

If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom.

On October 22, 1958, in response to the remand order, the District Court filed *not only* a memorandum *but an order too*, noting that the cause was dismissed with prejudice for want of prosecution under Rule 41(b) of the Fed. Rules of Civil Procedure, citing cases as its authority thereof. (R. 14)

Within the time set for filing a motion to have the Court of Appeals reinstate the appeal as they said they would do, petitioner obeyed the mandate but on December 15, 1958, without any reason given, received a copy of an order of the Court of Appeals that the motion to reinstate was denied. (R. 24) But, since the District Court also filed an order and since the remand order stated that the aggrieved party could appeal from that order, your petitioner filed her appeal therefrom and on January 30, 1959 the Court of Appeals allowed the brief filed in case No. 14,299 to be the brief in 14,844 with a notation that petitioner could file a supplemental brief by January 31, 1959. This order was received by petitioner on January 31, 1959. (R. 25)

On February 2, 1959 respondents' counsel (for Georgetown University Hospital and Finnerty) requested the Court to reconsider its motion of January 30, 1959 and called the Court's attention of the failure on the part of petitioner to obey or conform to Rule 15 and 16(b) of said court.

On March 23, 1959, the Court issued its final ruling from which your petitioner now prays for relief in the form

of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. (R. 14-14b4)

REASONS FOR GRANTING THE WRIT

The rulings of the Courts below are in conflict with decisions in numerous other circuits on the pertinent questions pertaining to the Federal Rules of Civil Procedure involved herein. This arm of the general federal law which is of constant and continuing importance should not be misinterpreted if litigants in federal civil cases are to be assured of true justice.

The rulings made are contrary to the plain meaning of the Federal Rules of Civil Procedure as they now stand and frustrates the purpose of the rules which were promulgated in the first instance to insure substantial justice for all seek same.

The acceptance of respondents allegations that the petitioner had not complied with Rules 15 and 16(b) of the Court of Appeals rules in case No. 14,844 was erroneous and without foundation since the record formally recognizes the fact that the appeal in its entirety is complete because by order of the Court of Appeals the record in 14,299 was accepted as the record as 14,844. Substantial injustice was committed thereby and your petitioner was deprived of her opportunity to have her day in court and to have her case heard on its merits and decided by a jury as her complaint prayed for.

Petitioner proceeded to appeal in 14,844 only because the remand of October 6, 1958 (Appendix 11a) stated that if either party was aggrieved by the action of the District Court in clarifying its own orders of October 7, 1957 and November 14, 1957 * * * "any party aggrieved thereby may

take an appeal therefrom." This was already done in 14,299 and the action initiated in 14,844 was repetitious but done in order to comply with the order of remand. No new issues were involved nor were any important rights acquired by the defendants within the period of time between October 7, 1957 and October 22, 1958.

This, in light of another part of the remand order which read: "If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after filing of such memorandum"—leaves your petitioner in a quandry because when your petitioner complied with that part of the order, the Appeals Court in a one sentence opinion dated December 15, 1958 ruled: "Upon consideration of appellant's motion to reinstate this appeal, it is

ORDERED by the court that the aforesaid motion is denied."

How, if ever, is a litigant going to be assured of being able to obtain justice when a Court states in one breath "If clarification is made by a memorandum of the District Court (which was accomplished) the appeal *will* be reinstated by this court on motion of appellant if filed within 10 days after the filing of such memorandum"—and that motion is timely filed—then in the next breath—after thee motion is filed—denies the reinstatement request.

Petitioner is prepared to go along with the action taken by the Appeals Court if the remand read "* * * this appeal *may* be reinstated by this court on motion etc. * * *" but when the order reads "* * * *will* be reinstated * * *" a reason for the change of mind is in order—otherwise appellants in similar cases will be frustrated whenever a remand contains a positive statement on the part of an appeals court as to what it will do if certain actions are complied with, knowing from the decisions rendered herein that

the words "may" and "will" will take on new meanings in the field of judicial discretion, and that the force of the word "will" will not have its true power exemplified as we know it now in connection with the laws and rules of our judicial system.

By this action, substantial injustice has been done to your petitioner, especially since the Appeals Court compounds its erroneous rulings herein by affirming a District Court's incorrect and erroneous interpretation of the Federal Rules of Civil Procedure as it pertains to Rules 41, 59 and 60.

On October [redacted] 1957 when petitioner through counsel, in open court stated (App. 19)

"The plaintiff requests and prays that a voluntary non-suit be entered as to the only issue before the Court today, namely, whether or not a burr-hole operation in the circumstances was called for.

"I would like the record to show the reasons for the voluntary non-suit, to-wit, because of the fact that Judge McGuire, who was not the pre-trial judge, granted summary judgment to defendants on the real issues of the case which were originally set forth in the original complaint, namely, for wrongful death, negligence and malpractice, and allowed in the original pre-tiral order of October 11, 1956, which called for a consolidated pre-trial statement and, noted by Judge McGuire in his memorandum of February 1, 1957.

"I quote from Judge McGuire's memo opinion wherein he stated: 'A cause of action has been stated in paragraph 4 of the second amended complaint.'

"Then at a hearing requested by the defendants, Judge McGuire granted summary judgment in favor of defendants, as noted further in his memorandum granting certain portions and striking other portions.

"We attempted to remedy this by filing a motion for leave to file an amended complaint, setting forth the original causes of action more articulately and clearly.

"Judge Tamm denied this motion and Judge McGuire denied the plaintiff's motion when she was represented pro se.

"We are therefore in the position, according to Judge Tamm and Judge McGuire, of being limited to the proof of the one issue left, namely, the only issue in the case is whether or not a burr-hole operation in the circumstances was called for.

"This narrow opinion changed the original cause of action filed by the plaintiff and accepted by the Court. This, obviously, is a minor and irrelevant issue, and because of this action, we do not want to waste the time of the Court when the main issues have been ruled out.

"In compliance with Judge McGuire's memorandum of February 1, 1957, (R. 71-72) the plaintiff submitted her medical statements ordered by the Court and later, in March of 1957, filed a further motion to amend the pretrial statement and/or the complaint in order that the plaintiff may include all subjects at issue contained in the medical information submitted in compliance with the said memorandum of February 1, 1957:

"Judge McGuire in ruling, stated on March 19, 1957: (R. 98-99)

"'This is a matter for the trial court. If it is sought to expand an order, the same is denied and the same is sufficiently broad in the circumstances.'

"'Therefore, under the circumstances, faced with the fact that summary judgment has been granted on factual issues and evidentiary issues and issues of fact in evidence, it would be a gross waste of time to try this case so bound, and, in our opinion, a gross miscarriage of justice.

"Therefore, too, since the motion to file an amended complaint and because of the emasculation of the causes of action, this present motion under Rule 41 of the Federal Rules of Civil Procedure is respectfully presented."

Thereupon, respondents requested of the Court that it rule that the case be dismissed for want of prosecution or, if plaintiff wishes to dismiss, the Court should exercise its power under the rule to require dismissal with prejudice. The Court responded, "If it is dismissed for want of prosecution, it is dismissed without prejudice.

* * * Yes, it would be without prejudice. I question my right to dismiss it with prejudice. *I quite agree that the case should be dismissed on the motion* entirely aside from any statement that has been made by plaintiff's counsel. *If plaintiff wants to come in and make a motion to dismiss,* I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion.

"I quite agree if there is to be a statement filed by counsel for the plaintiff—they have a right to file any statement they wish, I suppose—but they certainly should prepare it in writing and serve a copy upon counsel, but I question my right to require dismissal with prejudice. * * *

"I don't think I can dismiss a case with prejudice against his consent. I don't think I have a right to do that. **The only motion before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement.** The record speaks for itself, and I really don't see that you should be coming in here making a statement of this kind.

Underscoring and/or italics supplied by petitioner for emphasis.

"* * * **If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you do not want to do it, we will proceed to trial.***

"* * * I think you had better withdraw your whole statement, that is my suggestion."

MR. STEMPIL: **It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice.**

THE COURT: **I will grant that motion.***

MR. CONNELLY: We would like to have it dismissed for want of prosecution, if the Court please.

THE COURT: Well, it amounts to same thing. I will dismiss it for want of prosecution.

MR. CONNELLY: Will the record show the plaintiff is not ready to go to trial?

MR. STEMPIL: Oh, no; we are limited to the issue because of the summary judgment granted to the defendant was the meat of our action.

THE COURT: Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?

MR. STEMPIL: That is correct.

THE COURT: And you are moving to dismiss for want of prosecution. That is what the effect of it is.

MR. STEMPIL: **I don't like the words "for want of prosecution."***

MR. CONNELLY: For want of ability to proceed.

THE COURT: For want of ability to prove their case.

MR. STEMPIL: Under that one issue.

THE COURT: Under the issue that has been limited by the rulings of the Court.

MR. STEMPIL: That is right. Just so it is on the record.

THE COURT: Yes. Motion of plaintiff to dismiss cause of action on ground of inability to prove cause of action on issues as limited by the Court is granted.

* Underscoring supplied by petitioner for emphasis.

Following that when respondents counsel presents the order in connection herewith, reading: (R. 6, 14-19)

> "This cause having come before the Court for trial this 7th day of October 1957, and plaintiff's counsel having made an oral motion to dismiss on the ground of inability of plaintiff to prove a cause of action on the issues as limited by the Court and said motion having been argued and discussed by both counsel for the plaintiff and defendants, it is, by the Court, this 8th day of October, 1957:
>
> ORDERED, That the said cause be, and is hereby, dismissed.
>
> /s/ LUTHER W. YOUNGDAHL
> *Judge*

your petitioner refused to sign or consent to same because it did not contain the wording requested by petitioner namely—that a voluntary non-suit without prejudice was granted or dismissed without prejudice.

Over the continued objections of your petitioner that the order was incorrectly drawn, same was signed by the Court below.

This action, from all indications, was noticed too by the Appeals Court and after hearing argument on the case **despite the fact that respondents Georgetown University Hospital and Finnerty did not comply with the Court's rule requiring the filing of a brief for said appellees,** remanded the cause to the District Court (App. 9) for the purpose of clarifying its orders of October 8 and November 14, 1957 in respect of (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure. The Court further noted that if clarification was

made by memorandum of the District Court, the appeal "*will*"[1] be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom."

So, in response to that remand, on October 22, 1958, the District Court filed not only a memorandum but an order, too. The order now read: (R. 17-19)

> ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Federal Rules of C.P.
>
> /s/ LUTHER W. YOUNGDAHL
> *Judge*

This action from any point is a gross miscarriage of justice.

How could that Court in clear conscience create such a new and different situation when it clearly stated on October 7, 1957, in open court that

"If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial * * * I think you had better withdraw your whole statement, that is my suggestion."

Thereupon counsel for petitioner stated, "It is withdrawn, and at the same time, the motion is made cleanly for a non-suit without prejudice."

THE COURT: I will grant that motion.

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[1] Emphasis supplied by petitioner.

There is nothing in the record to indicate that the petitioner was guilty of lack of willingness to prosecute and from the record cannot be accused of failing to proceed or being guilty of want of prosecution, and when the District Court, out of term, tears apart petitioner's request for justice and the Appeals Court accepts this action, what else can petitioner do but appeal to this Honorable Court to correct such a gross miscarriage of justice occasioned by an erroneous interpretation of the Federal Rules of Civil Procedure?

Under 41(b) the rule provides that a *defendant* may move for a dismissal of an action or of any claim against him, if the plaintiff fails to prsecute or to comply with these rules or any order of court.

Such is not the case here.

The *plaintiff*, not *the defendants*, moved for a non-suit without prejudice * * * and it was granted, not at the plaintiff's instance alone but upon order of the court too and upon such terms and conditions as the court deemed proper. The last sentence of 41(a)(2) specifically reads:

"Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

How and under what authority could the District Court justify its subsequent action when 41(b) is not applicable as perceived by the record of the case.

Besides, in *Bryan* v. *Smith*, C.A. 7th 1949, 174 F2d 212, the Court ruled:

> "After dismissal, the action is no longer pending in the Court and no further proceedings in the action are proper. After dismissal of an action, the court is without jurisdiction and has no right to render any judgment either for or against plaintiff and the parties are out of court for every purpose other than to carry out

the order of dismissal or non-suit into effect or vacate or modify it."

Your petitioner claims that the District Court's order of October 22, 1958, failed to modify the order of October 7, 1957; it *changed* the order in violation of Rule 41(a)(2) and incorrectly applied its out of time ruling under 41(b).

Nowhere in the record is there any justification for the District Court's changed ruling showing that the petitioner was guilty of any act or omission for which the court could properly dismiss the action with prejudice for want of prosecution, and any act rendered in the form of an order or judgment is a decision against the law and an abuse of discretion.

Since a court takes judicial notice of its own records, but requires that one who relies on proceedings records must call them to the court's attention, this is respectfully done now, specifically to the proceedings of October 7, 1957 noting that the non-suit affected no right or remedy of the parties and that no decision to this day has been rendered on the merits.

"The plaintiff has not had a full and free opportunity of presenting all facts pertinent to the controversy to a jury as a matter of right."[2]

Therefore, when the Court of Appeals in its order of March 23, 1959 states that the trial judge did not abuse his discretion in dismissing for want of prosecution under 41(b) this constitutes manifest error that can be corrected only by this Honorable Court in the interest of justice and fair play and bound under its duty to protect the rights of its citizens who seek redress in the Courts of the United States as provided for in the Constitution under Article VII of the Amendments to said Constitution.

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[2] Buronum Co. v Nat. Alumenate Corp. D.C. Del. 70 F. Supp. 214-217.

"In suits at common law, where the value shall exceed twenty dollars, the right of trial by jury shall be preserved * * *"

In the instant case, your petitioner never had her day in court nor was she ever allowed to present her case or have it heard on its merits and allow the jury to decide the facts.

In *Pisciotti v. British Ministry of War Transport*, 12 F.R. Serv. 73 a.43, Case 1, 90 F. Supp. 518 (D.C.S.D.N.Y. 1949) the Court there ruled that

> "The filing of a notice of appeal perfects the appeal and the District Court thereafter *has no authority* to proceed further with the case or *to dismiss it for want of prosecution*." (Italics provided by petitioner for emphasis.)

In *Willoughby v. Sinclair Oil and Gas Co.*, 15 F.R. Serv. 73 a.42, Case 3, 188 F (2d) 902 (C.A. 10th 1951) the Court therein stated the rule thusly:

> "Filing of a notice of appeal and cost bond deprives the District Court of jurisdiction to set aside its judgment."

In our petitioner's case the appeal was timely filed and the cost bond posted, yet the Appeals Court allowed the District Court, *not to modify* an order *but to change* it to the complete prejudice of her rights and contrary to stated law.

In spite of the ruling in *Hirsh v. United States*, 15 F.R. Serv. 73 a.42, case 1, 186 F (2d) 524 (C.A. 6th, 1951) where in the Court laid down the interpretation of the rule under 73 of the F.R. of C.P. stating that

> "While an appeal is pending the District Court has no power to entertain a proceeding to modify the judgment appealed from" . . .

yet the Court of Appeals in the instant case accepted a changed order which deprived the petitioner of any chance for her day in court and to have her case heard on its merits by a jury.

As to the memorandum of the District Court filed on October 22, 1958 (ORR 14-19), justifying its action under

41(b) the cases cited are not applicable to the present cause of action. In *Walker* v. *Spencer*, 123 F 2d 347, 10th Circuit, 1941 a situation existed where the cause was dismissed for lack of diligence on the part of the plaintiff in trying to have the case tried. This was not so in your petitioner's case and nowhere in the record is there anything contrary to this contention.

In the cited case of *Rollison* v. *Wash. Nat'l Ins. Co.*, 176 F2d 364 (4th Circuit, 1949), the plaintiff was afforded several opportunities by the trial court to present his case in its most favorable aspect, but in the instant case the record definitely indicates the contrary. So this case too does not apply. In the *Lynch* v. *Nat. Bondholder's Corp.*, 2 F R D 376 (1942) plaintiff having submitted a trial brief and proposed special questions for submission to the jury on each disputed fact, and on the trial date the jury was present and defense counsel and witnesses were ready for trial, the plaintiff's counsel made a statement that he did not care to proceed further **and on motion of defendant,** the cause was dismissed with prejudice for want of prosecution. Such was not the situation in the instant case. There was no jury present—no trial brief had been submitted, no special questions were presented for submission to the jury on each disputed issue of fact and at no time did your petitioner state that she did not *care* to proceed further. In fact, she made it more than plain that it was her desire to make and did in fact make a motion for a non suit without prejudice under Rule 41 of the Fed. Rules of Civil Procedure. Of course it was under 41(a)(2) and could not be under 41(b) since it was being made by the *plaintiff* and not the defendant as required by 41(b).

Therefore, the citations used by the District Court in its memorandum of October 22, 1958 are inapplicable and incorrect as applied to this case.

As to the denial to the petitioner of her motion to rein-

state the cause of action on the grounds of misinterpretation, mistake, inadvertence, excusable neglect, under Rule 60(b) of the Fed. Rules of Civil Procedure, the motion was made in time, and petitioner was under the impression that this rule under (b) (1) did not limit the power of the court to entertain an action to relieve a party from a judgment, or an order, or proceeding, and that the court had a right, in the interest of justice to reinstate under the circumstances noted, and allow the plaintiff to have his day in court.

The District Court also ignored plaintiff's request under Rule 59(a)(2) where the court is permitted to grant a new trial to any or all of the parties in an action tried without a jury, for any of the reasons for which new trials have heretofore been granted in suits in equity in the Courts of the United States, and incorporated this ruling in its order of October 22, 1958 and again erroneously applied Rule 41(b) of the Fed. Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

I. William Stempil
Attorney for Petitioner.

July, 1959